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IN THE
Supreme Court of the United States
October Term, 1989

Estate of JAMES MANNO and DOMINICK MANNO, doing business as ASTORIAN MANOR,

Petitioners,

-against-

STATE OF NEW YORK, STATE TAX COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

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POINT I

IN THE APPELLATE DIVISION WHERE PROCEEDINGS WERE BEING CONDUCTED AT THE TRIAL RATHER THAN THE APPELLATE LEVEL, PETITIONERS WERE FREE TO MAKE AN EFFECTIVE MOTION TO AMEND THEIR INITIATORY JUDICIAL PLEADING TO REFLECT AND CLAIM THE BENEFIT OF THE FOURTEENTH AMENDMENT DUE PROCESS CONSTITUTIONAL CLAIMS DOMINATING THEIR CASE

In this case where, we contend, the New York State taxing authority violated the Fourteenth Amendment due

process rights of petitioners 1) by suppressing and concealing from petitioners material documentary evidence received by the State auditor in the course of a sales and use tax audit in which the documentary evidence was potentially decisive of the case and petitioners were clearly constitutionally entitled to have been given access to it, timely, in the course of the audit, and 2) where with respect to the 105 customers of petitioners out of 160 interviewed by the auditor, no evidence at all supports or justifies the tax assessment made on their account,* the respondents, in their opposition Brief herein, counter by claiming that, at the latest not only is the assertion of a claimed constitutional right or violation in the petition commencing the judicial proceeding necessary and essential for the future viability of the constitutional point, but, apparently that, in constitutional matters at least, the pleading itself is rigidly immune to change even at the trial level.

Such could possibly be the case, witness the Appellate Division holding herein (Appendix 2, p. 4a):

> "*** A claim of denial of due process which was not raised in the pleadings, or at the administrative hearing, as here, cannot be raised for the first time in this Court ***. Furthermore, petitioners failed to object to the admission of the documents in issue. Accordingly, this claim has not been preserved for our review."

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*As stated by the Appellate Division at p. 2 of this Brief, raising a constitutional objection at an administrative hearing has equal potency with objections raised in an initiatory pleading in a judicial matter for saving the constitutional point. And it should be remembered that at the administrative hearing of December 3, 1986 the testimony of the State auditor that the 105 interviewed "hostile witnesses" did "not deny" that their affairs took place, was vigorously attacked as resting on no evidence at all by petitioner (Pet. p. 9).

These 105 represent nearly 70% of the total assessment.

And to show the deficiencies of the Article 78, CPLR petition in this respect, respondents have annexed a copy of our CPLR petition (Resp. Brief, pp. A1-A11 which reads in pertinent part as follows:

> "(d) *** despite the fact that the Petitioners maintained a cash receipts book ***, checking accounts and bank statements reflecting cash deposits *** all of which *** were available to the agents, the report contains absolutely no indication that the agents attempted to reconcile the affairs indicated in Petitioners' appointment *** book for which they lacked contracts with the records maintained and sales and use tax returns submitted by the Petitioners prior to concluding that the mere fact that they checked contracts for the affairs in question reflected unreported sales; ***."

While the foregoing perceives our case somewhat dimly and far from perfectly, as happens frequently in the beginnings of cases that come to us out of obscure backgrounds, still, contrary to both State and federal rules which freely allow amendments of pleadings to conform to the facts—and here we brought out the constitutional character of the case from its very beginnings in the Appellate Division—sitting as a trial bench—still the Appellate Division, mistakenly assuming the attributes of an appellate court although actually sitting as a specially statutorily designated Court of original jurisdiction, chose to ignore our seriously intended argument in our formal motion to amend our petition to conform to the evidence we had adduced of constitutional violations in respoents' conduct and thus qualify them for judicial remediation.

And thus we said both in our Reply Brief to the Appellate Division which was trying our case and was hearing our trial argument *before* its trial decision of the case, and as quoted in our petition for certiorari at page 17:

> " '*** in this judicial forum where this Court sits in an exercise of original rather than appellate jurisdiction, the constitutional and statutorily procedural objections were open to the petitioner to make under the general issue. And, if such is not the case, we respectfully move this Court, here and now to amend our petition to allege facts out of which said constitutional and statutory procedural objections arise. ***' "

What the Appellate Division and the respondents seem to be losing sight of is that our federal Constitution was and is an instrument intended to be enforced, and the foregoing motion was a trial motion and not an attempt on appeal to recover a point which had been neglected below.

At this time we submit, in single copy and for whatever application the Court may elect:

1. The Record on transfer to the Appellate Division

2. Petitioners' Main and Reply Briefs to the Appellate Division

3. Respondents' Opposition Brief to the Appellate Division

4. Petitioners' Jurisdictional Statement to the New York Court of Appeals

5. Petitioners' Comments to the New York Court of Appeals

6. Respondents' Comments to the New York Court of Appeals

Copies of all of the foregoing were exchanged with adversary counsel and are already in their possession.

POINT II

TACITLY, RESPONDENTS HAVE CHOSEN NOT TO CONTEST THE MERITS OF PETITIONERS' PROOFS THAT RESPONDENTS HERE VIOLATED FOURTEENTH AMENDMENT DUE PROCESS BOTH PROCEDURAL AND SUBSTANTIVE, AND ALSO DO NOT CONTEST THE FACT OF PETITIONERS' VIGOROUS ATTACK, *AT THE ADMINISTRATIVE HEARING* (Pet. p. 9), UPON THE SUFFICIENCY OF THE EVIDENCE SOUGHT TO BE ADDUCED IN SUPPORT OF THE TAX ASSESSMENT BASED ON THE 105 "UNCOOPERATIVE WITNESSES"

The silences of Respondents' Opposition Brief are eloquent. Not only does it make no comment on our assertion that there is no evidence to support the assessment of sales tax with respect to the 105 "uncooperative witnesses," it also omits to relate that the clear insufficiency was vigorously exposed and attacked at the administrative hearing. The importance of these 105 out of the 160 interviewed should not be underrated since nearly 70% of the total tax assessment is attributable to the 105.

Nowhere does respondents' Brief even touch upon, let alone contest our account of the three year suppression by the auditor and the Tax Commission of the 30 receipted contracts and their capability of being matched to cash sales journal entries—like the receipted contracts that had

been kept in folders which perfectly matched to corresponding entries in the cash sales journal.

Nowhere does it contest the fact that guilt or innocence of the vendors was instantly determinable by the matching test and that respondents did not dare to proclaim the results of such a test.

In short respondents would prefer to make no issue of any of the merits of this constitutional case.

But, for good or ill, respondents have added a fourth question presented by the case, and an important one at that, namely, whether the preclusive practice of effectively excluding federal constitutional questions and arguments from merit consideration by State courts, whether sitting in original or appellate jurisdiction, because of failure to claim or identify constitutional rights or violations in the pleadings originating the case, coupled with State court practice making such pleading immutable to change or amendment even at the trial level of the case ought not to be reviewed by this Court?

Patently, had our motion to amend the petition to reflect due process constitutional issues urged by us throughout the transferred hearing before the Appellate Division been respected and granted, the marked lack of a disposition on the part of respondents to dispute its constitutionally impermissible concealment and withholding of the customer-supplied 30 receipted contracts from James Manno and respondents' tacit admission that no evidence supported the tax assessment with regard to the 105 "hostile witnesses," would surely be telling. In fact such failure to confront the merits of petitioners' case does nothing to raise the moral stature of respondents' case.

CONCLUSION

For the foregoing reasons as well as those urged in our petition, we respectfully pray this Court to issue its writ of certiorari herein.

Dated: Brooklyn, New York
July 16, 1990

Respectfully submitted,

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